SUPREME COURT U. S.

OCT 29 1974

IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN P. PRICE
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana

Other Counsel:

RICHARD J. DARKO
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana

Central Publishing Company, Inc., Indianapolis, Ind. 46206

TABLE OF CONTENTS

Page

Alphabetical List of Authorities ii

Reference to Opinions Below 2

Jurisdiction 2

Questions Presented for Review: 2

1. Whether Petitioner was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States by reason of being represented by the same counsel as his co-defendants, over repeated objections and motions of counsel to withdraw? 8

2. Whether the evidence was sufficient to support Petitioner's conviction of violating 18 U.S.C. § 1955? 13

3. Whether the District Court committed reversible error by admitting documentary and tangible evidence against Petitioner, over objection, which evidence was not shown to be relevant to the charges made against Petitioner? 17

Constitutional Provision and Statute Involved 3

Statement of the Case 3

Jurisdiction of the District Court 6

Reasons for Allowance of the Writ

Introduction 7

TABLE OF CONTENTS—Continued

Page

Conclusion 20

Certificate of Service 21

Appendix A A-1

Appendix B A-13

Appendix C A-14

ALPHABETICAL LIST OF AUTHORITIES

Page

Cases

Campbell v. United States, 352 F.2d 359 (DC Cir. 1965) 11

Glasser v. United States, 315 U.S. 60 (1942) 8, 9, 11

Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972) .11, 12

People v. Donahoe, 200 Cal. App. 2d 17, 19 Cal. Rptr. 454, 462 (1962) 9

United States v. Becker, 461 F.2d 230 (2nd Cir. 1972) .7, 17

United States v. Bobo, 477 F.2d 974 (4th Cir. 1973) .7, 14

United States v. Harris, 460 F.2d 1041 (5th Cir. 1972) 7, 10

United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973) 8, 17

United States v. Joyce, —— F.2d —— (No. 73-1014, May 9, 1974) 19

United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973) 10, 11

United States v. McHale, 495 F.2d 15 (7th Cir. 1974) . 8

United States v. Riehl, 460 F.2d 454 (3rd Cir. 1972) . 8

Statutes

Title 18, United States Code, Section:

371 3

1955 .....2, 3, 4, 6, 7, 8, 14, 17

3231 6

ALPHABETICAL LIST OF AUTHORITIES—Continued

Page

Statutes—Continued

Title 28, United States Code, Section:

1254(1) 2

Constitutional Amendments

U. S. Const. Amend. VI 2, 3, 8

Other

Title VIII, Organized Crime Control Act of 1970, Pub. L. 91-452 7

23 Arkansas Law Review 250 (1969), "Conflict of Interests in Criminal Proceedings" 13

IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No.

ARCHIE JAMES SHUMAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on July 31, 1974, only insofar as that judgment relates to Counts II and III of the criminal indictment under which Petitioner was charged in the federal District Court for the Southern District of Indiana.

REFERENCE TO OPINIONS BELOW

The District Court did not issue an opinion in this case. The Court of Appeals for the Seventh Circuit issued an unpublished Order, pursuant to Circuit Rule 28, on July 31, 1974, a copy of which Order is appended hereto, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered by its Order of July 31, 1974. (Appendix A, infra). On August 26, 1974, the Honorable Thomas E. Fairchild granted Petitioner an extension of time until September 9, 1974, within which to petition the Court of Appeals for a re-hearing.

On September 9, 1974, Petitioner filed a timely Petition for Re-Hearing in the Court of Appeals. On September 30, 1974, the Court of Appeals issued an Order denying Petitioner's Petition for Re-Hearing, a copy of which Order is appended hereto as Appendix B.

The jurisdiction of this Court is envoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States by reason of being represented by the same counsel as his co-defendants, over repeated objections and motions of counsel to withdraw?

2. Whether the evidence was sufficient to support Petitioner's conviction of violating 18 U.S.C. § 1955?

3. Whether the District Court committed reversible error by admitting documentary and tangible evidence against Petitioner, over objection, which evidence was not

shown to be relevant to the charges made against Petitioner?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix C, infra.

They are: (1) The Sixth Amendment to the Constitution of the United States, appearing in Volume 1, United States Code, Page XLVIII, (2) 18 United States Code § 1955, appearing in Volume 4, Page 4348 (1970 Ed.) and in Supplement II, Page 393 (1972).

STATEMENT OF THE CASE

On April 25, 1972, Petitioner, together with twenty-nine (29) other individuals, was charged in a three-count indictment returned by a grand jury for the Southern District of Indiana. Count I charged Petitioner with a violation of Title 18, United States Code, § 371. Petitioner was convicted under Count I of a violation of 18 United States Code, § 371, but that conviction was reversed by the Court of Appeals, and is not called into issue in this Petition for Certiorari.

Counts II and III of the indictment charged a violation of Title 18, United States Code, § 1955, which relates to certain illegal gambling activities. Petitioner was convicted under Counts II and III, those convictions were affirmed by the Court of Appeals, and it is those convictions which Petitioner asks this Court to review by certiorari.

Counsel Edward Kelly was retained to represent Petitioner together with eighteen (18) other defendants. Fif-

teen (15) of the other defendants represented by Mr. Kelly chose to enter pleas of guilty to the charges. As a consequence of some of Mr. Kelly's clients entering pleas of guilty, the trial court held a hearing (Tr. 934-962*) to discuss with those clients of Mr. Kelly who had not plead guilty the possibility of a conflict of interest between themselves and those clients who had plead guilty and intended to testify for the Government, but who continued to be represented by Mr. Kelly.

At the time of the hearing, the case had been set for trial the following morning, and the trial court made it clear that it proposed to proceed with the trial the following morning. (Tr. 944, 951-952)

At the conclusion of that hearing, Petitioner indicated that he was willing for Mr. Kelly to continue as his counsel. (Tr. 950)

The trial commenced with Mr. Kelly representing Petitioner and three other defendants. As discussed more fully infra, as the Government's case in chief was presented at trial it immediately became obvious to Petitioner that the relationship between himself and the gambling operation which the Government alleged to exist was significantly different from the relationship between the gambling operation and Petitioner's co-defendants who were also represented by Mr. Kelly. It appeared to Petitioner that while his conduct was beyond the purview of Title 18, United States Code, § 1955, the conduct of his co-defendants, who were shown to be employees of the gambling operation, might constitute a violation of the statute. Petitioner therefore determined that Mr. Kelly

*The Tr. designation throughout refers to the transcript at the Court of Appeals.

could not adequately represent Petitioner, together with the co-defendants.

Petitioner moved to be severed from the trial and for successor counsel. Mr. Kelly moved to withdraw as counsel for Petitioner. The District Court overruled the motions. (Tr. 769-772) During the remainder of the trial Petitioner repeatedly moved the Court to sever him from the trial, and for successor counsel. Each such motion was overruled by the Court. (Tr. 187-189; 394-395)

The evidence presented at the trial tended to show that a Mr. Charles W. Brown conducted a gambling operation, commonly known as a horse booking business, headquartered at 8649 E. 46th Street, Apartment #10, Indianapolis, Indiana. (Tr. 4) Mr. Brown testified that his partner in the gambling operation was Claude W. Clarke (Tr. 6), and that the gambling operation had two employees at that location—William Neal Clark and Joe Sights (Tr. 5).

Mr. Brown also testified that the gambling business operated a casino located on East 10th Street, Indianapolis, Indiana, and that defendants Baird and Brady were salaried poker dealers at the East 10th Street location. (Tr. 137-138)

Specifically as to Petitioner, evidence was presented that Petitioner placed bets with the gambling operation (Tr. 11) and that a rack (Government Exhibit 30; Tr. 73) was maintained in the office on East 46th Street on which rack Petitioner was identified as "No. 7". (Tr. 490-55)

Testimony was presented that Mr. Sights, an employee of the gambling operation, delivered four (4) copies of the Daily Racing Form and six (6) copies of the Illinois Sporting News to Petitioner as a convenience or service.

(Tr. 484:10) The gambling operation gave Petitioner a fifty (50) percent discount, so that if he won five hundred dollars ($500) on his bets he would only be paid two hundred fifty dollars ($250) by the gambling operation and if he lost five hundred dollars ($500) on his bets he would only be required to pay two hundred fifty dollars ($250) to the gambling operation. (Tr. 17:88; 18:93, 94; 19:95)

Mr. Brown testified that Petitioner was a customer or account of the gambling operation, and was not an employee (Tr. 128-130), Mr. William Clark, who was employed by the gambling operation, testified that Petitioner was only a bettor and nothing else (Tr. 728, 729, 731) and further Mr. Joe Sights, who was an employee of the gambling operation, categorized Petitioner as a customer. (Tr. 490)

The District Court admitted substantial amounts of gambling paraphernalia and documentary evidence against Petitioner, over objection on the grounds of relevancy. Although such evidence was shown to be linked up with Petitioner's co-defendants, it was not shown to be connected to Petitioner. The District Court did not limit its admission of such evidence to only certain defendants.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of Indiana arose under Title 18, United States Code, § 3231 and Title 18, United States Code, § 1955.

REASONS FOR ALLOWANCE OF THE WRIT

Introduction

A preliminary determination as to the congressionally intended scope and purview of Title 18, United States Code, § 1955, under which Petitioner was convicted, is crucial to an explanation of the reasons why Petitioner believes that the writ of certiorari should be allowed as to the first two questions presented for review.

Although this Court has not as yet interpreted the intended scope of the statute, the opinions of the Courts of Appeal which have considered the matter are uniform in their holdings that the statute was not intended to bring all illegal gambling activity within the control of the federal Government, but rather that it was intended only to deal with illegal gambling activities of major proportions.

The statute was enacted as part of Title VIII of the Organized Crime Control Act of 1970, Pub. L. 91-452. The legislative history of the Act in general, and of § 1955 in particular, was discussed in great detail by the 5th Circuit Court of Appeals in *United States v. Harris,* 460 F.2d 1041 (1972), in which the Court concluded that the statute was intended to apply to employees, such as watchmen and dealers, but was not intended to include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

The 2nd Circuit in *United States v. Becker,* 461 F.2d 230 (1972) held that the statute was not intended to include customers of the business.

In *United States v. Bobo,* 477 F.2d 974 (1973) the 4th Circuit recognized that the statute was not intended to reach a customer or a mere bettor.

Accord: *United States v. Hunter*, 478 F.2d 1019 (7th Cir. 1973); *United States v. McHale*, 495 F.2d 15 (7th Cir. 1974); *United States v. Riehl*, 460 F.2d 454 (3rd Cir. 1972).

Prefatory to a discussion of the first and second questions presented for review Petitioner urges this Court to adopt the uniform determination of the Courts of Appeal that a customer or mere bettor in a gambling operation is not included within the purview of Title 18, United States Code, § 1955, although employees such as watchmen and dealers may be included.

1. The writ should be allowed as to the first question presented for review for the reason that the Court of Appeals determination that Petitioner was not denied the effective assistance of counsel is in conflict with the appropriate standards established by this Court in *Glasser v. United States*, 315 U.S. 60 (1942).

In considering circumstances in which a defendant was required to be represented by the same counsel as his co-defendant, this Court stated that the "assistance of counsel" guaranteed by the Sixth Amendment "contemplates that such assistance be untrammeled and unimpaired by court order requiring that one lawyer shall simultaneously represent conflicting interests." This Court determined that:

> "Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made,"

thus establishing the proper standard to be whether the representation of counsel was "as effective as it might have been" if counsel had not been required to represent different interests.

Glasser, supra, further held that the right to effective assistance of counsel is too fundamental and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As urged under the second question presented for review, Petitioner does not believe that the evidence was sufficient to convict him of a violation of the statute. Even assuming arguendo that the evidence was sufficient, it was at best marginal. Thus, the Court of Appeals ought to have taken cognizance of this Court's statement in *Glasser* that:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scale of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." *Glasser,* at 67.

The prejudicial conflict of interest faced by Petitioner was that Mr. Kelly represented defendants who were shown by the testimony of the first witness, Mr. Charles W. Brown, to be directly employed by the gambling operation, while also attempting to represent Petitioner who was not shown to be employed. Mr. Kelly was impeded from emphasizing testimony showing Petitioner's relationship to the gambling operation to be that of a customer, and from emphasizing that point to the jury in argument, because to do so would at the same time emphasize the close connection of his other clients to the gambling operation. See, *People v. Donahue,* 200 Cal. App. 2d 17, 19 Cal. Rptr. 454, 462 (1962).

Such a distinction as to the weight of the evidence between co-defendants represented by sole counsel may not be of such importance if the indictment charges a more traditional criminal offense such as bank robbery or mail fraud. However, as discussed supra, the statute under which Petitioner and his co-defendants were charged is a highly technical statute, specifically drafted so as not to reach persons who participate in an illegal gambling activity by placing a bet, although reaching street level employees of a gambling operation such as doormen or runners. *United States v. Harris*, supra.

Faced with the necessity for demonstrating such close distinctions, Petitioner was entitled to independent counsel who could argue vociferously for Petitioner and Petitioner alone. Without intending any criticism of Mr. Kelly, he simply was not able to fully devote his attentions to Petitioner's particular circumstances because the activities of his various clients fell on both sides of the close and technical line drawn by the statute. Mr. Kelley so indicated by moving to withdraw as counselor for Petitioner. (Tr. 769-772)

Two recent Court of Appeals decisions demonstrate the error of the Court of Appeals judgment in this case, and illustrate the conflict faced by Petitioner. In *United States v. Marshall*, 488 F.2d 1169 (9th Cir. 1973) the connection of the defendant Marshall to the conspiracy which was charged was substantially less than that of his co-defendants, one of whom was represented by the same counsel as Marshall. The Court found that the dual counsel had slighted Marshall's defense for that of his co-defendant. The record disclosed no effort on the part of the dual counsel to demonstrate to the jury the defendant Marshall's lack of connection to the conspiracy, just as the record in this case demonstrates little effort on the

part of Mr. Kelly to demonstrate Petitioner's precise relationship to the gambling operation.

The Court in *Marshall,* supra, concluded that the defendant had been denied the effective assistance of counsel, reversing and remanding with directions.

Similarly, in *Holland v. Henderson,* 460 F.2d 978 (1972) the 5th Circuit found that the defendant Holland was denied the right to effective cross-examination of Government witnesses by reason of his counsel also representing his co-defendant. The Court concluded that "the duality of the representation afforded Holland was nothing more than the pro forma entry of an appearance as counsel."

Both *United States v. Marshall,* supra, and *Holland v. Henderson,* supra, support the proposition that dual representation by retained counsel can deny a defendant the effective assistance of counsel as can dual representation by appointed counsel.

The Court of Appeals Order justifies the dual representation of counsel by finding that Petitioner waived his right to independent counsel, at the hearing held by the District Court before trial began.

Yet, as *Glasser,* supra, instructs in these circumstances, the Courts must "indulge every reasonable presumption against the waiver of fundamental rights." The District Court had an affirmative obligation to insure that Petitioner had in fact intelligently and knowingly waived his right to retain successor counsel, in view of the peculiar posture of Petitioner vis-a-vis his co-defendants represented by Mr. Kelly. *Campbell v. United States,* 352 F.2d 359 (DC Cir. 1965).

At the hearing held by the District Court, the only discussion of any conflict of interest was between defendants

pleading guilty represented by Mr. Kelly and defendants pleading not guilty represented by Mr. Kelly. There is no showing in the record that Petitioner was in any manner made aware of the potentiality, and indeed the actuality, of a conflict between himself and his co-defendants who plead not guilty and were represented by Mr. Kelley. This conflict faced Petitioner only, and did not affect his co-defendants. Court of Appeals treated Petitioner's argument together with that of his co-appellants, apparently not recognizing the precise conflict of interest which Petitioner felt so acutely after the testimony of the first witness at trial.

The decision of the 5th Circuit in *Holland v. Henderson*, supra, is also instructive on the question of a defendant's knowing and intelligent waiver of independent counsel. The Court there stated as follows:

> "A defendant may knowingly waive his right to separate counsel just as he may knowingly waive the assistance of any counsel, but where an attorney undertakes joint representation and foresees, or should have foreseen, conflicting duties to his clients, he *must* suggest separate counsel and make a sufficiently full disclosure of the conflict that his clients may knowingly waive their right to counsel."

The record does not show that Mr. Kelly made any attempt to advise Petitioner, before trial, as to the possibility of a conflict between Petitioner and Mr. Kelly's other clients who were going to trial on pleas of not guilty. The record does demonstrate (Tr. 767-772) that Mr. Kelly moved to withdraw as counsel for Petitioner during the trial as a result of his apprehended conflict of interest. His motion was denied by the trial court.

Petitioner should not have been held to have knowingly waived his right to separate counsel when the facts giving

rise to the conflict of interest on the part of dual counsel were not brought to his attention.

Despite the statement of the Court of Appeals to the contrary (Court of Appeals Order, page 4) Petitioner does not urge that ipso facto there was a conflict of interest because Mr. Kelly represented four (4) defendants at trial. Rather, Petitioner urges that there was a conflict because of the technical nature of the statute and because of the substantially different relationship between himself and the gambling operation vis-a-vis his co-defendants and the gambling operation.

The transcript reveals no attempt by Mr. Kelly to distinguish Petitioner as a mere customer or bettor from Kelly's other clients, as to whom there was considerable evidence of employment by the gambling operation. Petitioner felt compelled to attempt to argue his case to the jury personally to demonstrate, as Kelly could not, his unique relationship to the gambling operation. (Court of Appeals Order, page 7) Petitioner's felt necessity of making a personal argument, and the trial court's willingness to allow him to do so, should of themselves demonstrate sufficiently the existence of a conflict of interest to entitle Petitioner to issuance of the writ. Constitutional guarantees of the effective assistance of counsel cannot be met by requiring, or allowing, a criminal defendant to represent himself when he has repeatedly requested counsel, and when his current counsel has repeatedly moved to withdraw by reason of a conflict of interest.

See generally, Conflict of Interests in Criminal Proceedings, 23 Arkansas Law Review 250 (1969).

2. Sufficiency of the evidence. Petitioner urges this Court to allow the writ on the second question presented for review, although this Court does not frequently con-

sider matters of sufficiency of evidence, in view of the novelty and technical nature of the statute under which Petitioner was convicted, and in view of the need of a nationally uniform interpretation of the statute.

Petitioner recognizes the appropriate standard for appellate review of the sufficiency of the evidence to be that a conviction will be sustained if there is substantial evidence, taking the view most favorable to the government, to support the findings of guilty. *United States v. Bobo,* 477 F.2d 974 (4th Cir. 1973). Applying that standard to the facts at bar, Petitioner asserts that in view of the legislative history and intended scope of Title 18, United States Code, § 1955 the evidence was not sufficient to convict. Petitioner believes that his conviction was affirmed by the Court of Appeals based upon unsupported and unwarranted assumptions of fact, which had also been entertained by the Government and by the District Court judge.

The Court of Appeals found the evidence to be sufficient to support Petitioner's conviction upon an analysis that Petitioner had engaged in the practice of laying off bets with the gambling operation. (Court of Appeals Order, page 6) A lay off bet occurs when a bookmaker has accepted a bet in an amount which he feels he cannot personally cover, and then transfers all or part of that bet to a second bookmaker or bookmaking operation, such as the gambling operation shown to exist in this case. Cf., *United States v. Bobo,* supra. Petitioner agrees that he placed bets with the gambling operation, but asserts that the bets were his own personal bets, and that there is no substantial evidence in the record to indicate that the bets were in the nature of lay off bets.

As set out in the statement of the case, supra, the evidence tended to show that a Mr. Brown and his partner, a Mr. Clarke, owned and operated the gambling operation, and employed a Mr. William Clark and a Mr. Sights at the bookmaking location. (Tr. 4-5)

Owner Brown testified that Petitioner was a customer or account of the gambling operation, and was not an employee. (Tr. 128-130) Employee Clark testified that Petitioner was only a bettor and nothing else. (Tr. 728-729, 731) Employee Sights categorized Petitioner as a customer. (Tr. 490)

Partner Clarke was asked the following question and gave the following answer:

> "Q. Mr. Clarke, would you classify Mr. Shumar as only a bettor, nothing else, in the Brown operation?
>
> A. As a bettor." (Tr. 729)

If Petitioner was in fact laying off bets, it would be expected that the owners and employees of the gambling operation would have been aware of the nature of his business, and would have so testified. Their testimony was not uncooperative to the Government in other regards. Under the language of the statute, Petitioner must be shown to have "conducted" the operation. No suggestion has been made by the Government that Petitioner financed, managed, supervised, directed or owned all or any part of the gambling operation, which are the other qualifying adjectives of the statute.

It would be a strange situation indeed for the owners of a business to not even know who was "conducting" their operation.

The bulk of the other evidence at trial consisted of tape recordings of incoming and outgoing telephone calls to

the headquarters of the gambling operation on East 46th Street. (Tr. 295-308) Selected conversations from these tapes were played by the Government at trial. However, the only apparent reference to Petitioner in any of these conversations played in Court appears at Tr. 374, a conversation taking place on March 28, 1972. Even that reference to Petitioner does not indicate the substance of the conversation, nor whether it was an incoming or outgoing call, much less whether a lay off bet or a personal bet was being placed.

The Government, the District Court judge (Tr. 508-509) and the Court of Appeals (Court of Appeals Order, page 6) have all entertained the assumption that Petitioner was in fact placing lay off bets. Nonetheless, Petitioner believes that even taking the view of the evidence most favorable to the Government, there is no substantial evidence of his placing lay off bets.

The evidence relied upon by the Court of Appeals to show that Petitioner placed lay off bets (Court of Appeals Order, page 6, last paragraph and cont. on page 7) is equally consistent with the fact of placing personal bets as with placing lay off bets.

The substance of the telephone calls referred to by the Court of Appeals has not been shown. As to Petitioner's identification as "7" on a wooden rack maintained by the gambling operation, Government witness Sights, who was employed by the gambling operation, testified that Petitioner, along with all of the other persons whose names were listed on the rack, were customers and that the rack was used to keep track of bets. (Tr. 490) The rack was not used solely for lay off bets.

Sights similarly testified that racing forms were delivered to Petitioner merely as a conveience, and that

anyone could purchase copies of those forms at local newsstands in Indianapolis. (Tr. 498, 505)

The fifty (50) percent discount allowed Petitioner by the gambling operation was not substantially different from that offered to other bettors, many of whom were not indicted. (Brown testimony, Tr. 129-130; Clarke testimony, Tr. 619) It amounted to a volume discount to Petitioner, and not a commission. There was no evidence that Petitioner operated as a salesman for the gambling operation, or that he received any more or less money as the gambling operation expanded or contracted.

Petitioner was not shown to have shared in the profits of the gambling operation in any way other than by the placing of personal bets which happened to win, he was not shown to have supervised or directed the employees of the gambling operation, he was not shown to have made any attempt to find new business or customers for the operation, and he paid no part of the expenses or overhead of the operation. The evidence shows only that Petitioner placed bets with the operation as a customer, and such conduct simply does not fall within the reach of 18 U.S.C. § 1955. *United States v. Hunter*, supra; *United States v. Becker*, supra.

3. Admission of prejudicial irrelevant evidence. Substantial amounts of gambling paraphernalia and documentary evidence was admitted against Petitioner, over objection, which was not shown to be connected to Petitioner, nor relevant to the charges properly made against him. The trial court did not limit its admission of such evidence to only certain defendants, nor did it instruct the jury that certain evidence might be admissible as to some defendants, but not admissible as to others.

The following chart lists the numbers of Exhibits which Petitioner contends were improperly admitted against him, the transcript page at which the Exhibit was introduced, a brief description, and the transcript page at which the Exhibit was admitted into evidence as to Petitioner:

Number	Page Introduced	Description	Page Admitted
6-10	210	Telephones	213
11	255	Clock	258
14, 20, 23, 27	285	Documents	288
15	204	Adding Machine Tape	205
16	213	Document	214
17	259	Betting Form	261
24	202	Cards	203
25	196	Ohio Sports News	198
19, 28, 28A	261	Documents	265
26	278	Document	280
49-66	200	Photographs	201
134, 135, 136	440	Telephone and Forms from Clarksville, Indiana	443
137, 138	538	Poker Chips	541

The trial court apparently admitted this evidence against Petitioner under Count I, a conspiracy count, under the familiar rule that evidence relevant to one indicted conspirator is admissible as to all alleged co-conspirators. When the Government attempted to justify the introduction of such evidence against Petitioner, it did so on the theory that a conspiracy was being charged. (Tr. 257, 264, 442)

However, the Court of Appeals reversed Petitioner's conviction under Count I, and no party has asked this Court

to review that portion of the Court of Appeals judgment. (Court of Appeals Order, page 2)

The cumulative effect of the admission of the above described Exhibits against Petitioner was to convince the jury that he was part and parcel of the gambling operation owned by Mr. Brown and Mr. Clarke, and its admission must therefore constitute reversible error.

The introduction of Exhibits 134-136 (which were seized in Clarksville, Indiana) and Exhibits 137 and 138 (which were seized at the casino operated by the gambling business on East 10th Street) were particularly damaging to Petitioner because there was no testimony whatsoever that he had any connection with either of those locations.

It is impossible to surmise what result the jury would have reached as to Counts II and III against Petitioner had this evidence not been admitted.

The Court of Appeals Order relies upon its decision in *United States v. Joyce*, —— F.2d —— (No. 73-1014, May 9, 1974) to justify admission of the evidence on conspiracy rules of evidence, even though the conspiracy conviction had been reversed by the Court of Appeals. (Court of Appeals Order, page 7)

However, the relationship between the defendants in *Joyce* was considerably closer than the relationship between Petitioner and the gambling operation alleged in this case. The record does not demonstrate that any of the evidence admitted over Petitioner's objection was used by the gambling operation in furtherance of a common scheme together with Petitioner. Therefore, the evidence should not have been admitted against Petitioner, its admission necessarily constitutes reversible error, and the writ should be allowed.

CONCLUSION

It is respectfully submitted that certiorari should be granted as to each of the three questions presented herein for review.

The first question presented for review necessarily colors the second and third questions presented. If, as Petitioner urges, he was denied the effective assistance of counsel, over repeated motions to sever and motions to withdraw, without the showing of a knowing and intelligent waiver, the effects of such a prejudicial denial can be expected to be reflected in the evidence presented.

A writ of certiorari should be granted.

Respectfully submitted,

/s/ JOHN P. PRICE

John P. Price
Attorney for Petitioner

2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204
Telephone: 317-635-8900

Other counsel:

RICHARD J. DARKO

2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204
Telephone: 317-635-8900

IN THE

Supreme Court of the United States

October Term, 1974

No.

ARCHIE JAMES SHUMAR,

v.

UNITED STATES OF AMERICA,

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition For Certiorari has been served upon the following counsel, pursuant to Rule 33(1)(3)(b), Revised Rules, Supreme Court of the United States, by depositing three copies of the same for each counsel in the United States mail with first class airmail postage prepaid.

Solicitor General
Department of Justice
Washington, D. C. 20530

Stanley B. Miller
District Attorney
United States Court House
Room 246
Indianapolis, Indiana 46204

Edward F. Kelly
Riley Towers
225 East North Street
Indianapolis, Indiana 46204

K. Edwin Applegate
321 E. Kirkwood
Bloomington, Indiana 47401

James Manahan
129 E. Market St.
Indianapolis, Ind. 46204

Dated this 25th day of October, 1974.

JOHN P. PRICE

John P. Price
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana

APPENDIX

APPENDIX A

"Unpublished Order"
Not to be cited,
per Circuit Rule 28.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued June 7, 1974)

July 31, 1974

Before

Hon. TOM C. CLARK, *Associate Justice**
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. GEORGE N. BEAMER, *District Judge***

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CLAUDE W. CLARKE— No. 73-1574 THOMAS LEE BRADY— No. 73-1575 FRANK PAUL BAIRD— No. 73-1576 ARCHIE JAMES SHUMAR —No. 73-1577	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 72 CR 111 James E. Noland *Judge*

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Chief Judge George N. Beamer, United States District Court, Northern District of Indiana, is sitting by designation.

ORDER

These appeals, combined for argument, grew out of a three-count indictment against 30 defendants, of whom only five went to trial and four have appealed. Count I of the indictment was brought under 18 U.S.C. 337[1] charged a conspiracy to violate 18 U.S.C. § 1955[2], and Counts II and III are substantive offenses under § 1955 [conducting etc. an illegal gambling business]. The jury found appellants Claude W. Clarke and Archie James Shumar guilty on all three counts and appellants Thomas Brady and Frank P. Baird guilty only on Counts II and III. (Brady came clear on Count I and Baird was not charged thereunder).

Appellant Clarke was manager and 50 percent partner in a million dollar a year horse booking operation in Indianapolis. In addition, the partners operated a casino "United States Disabled War Veterans Club" in Indianapolis. Brady and Baird were salaried poker dealers at the casino and Shumar was a key account for lay-off bets placed by the booking operation.

Each of the appellants raises four points of error: (1) There was a conflict of interest present at the trial requiring severance or a change in counsel by reason of the fact that 19 of the defendants, including all 4 appellants, were represented by the same counsel at trial despite their interests being in conflict and although counsel made every effort to be relieved by the court; (2) wiretap recordings admitted into evidence should have been suppressed because the United States failed to comply with the statutory authorization requirements; and, further, because it failed to minimize interception; and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 failed to afford minimum constitutional protections; (3) Section 1955

is unconstitutional as applied and does not afford minimum constitutional protections; and (4) the court's failure to permit the wiretap recordings already in evidence to be played to the jury on behalf of the defense. Appellants Clarke, Shumar and Brady raise a fifth point, i.e. there can be no prosecution of them under both conspiracy to violate § 1955 and for substantive violations of the same statute. We affirm the judgments as to all of the appellants on Counts II and III but reverse as to Clarke and Shumar under Count I of the indictment.[3]

1. The Conviction to Conspire Under Count I:

We do not write on a clean slate with reference to this issue. A case on all fours coming from the same District Court was decided by this Circuit on April 11, 1973 and is binding upon us. *United States v. Hunter and Hill,* 478 F.2d 1019. There, in an identical prosecution, Judge Stevens, speaking for the court, held that "a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons [the defendants] necessarily performed by the commission of the substantive offense itself." At 1026. We, therefore, reverse the judgment against appellants Clarke and Shumar on Count I of the indictment only and remand for further proceedings in accordance with this opinion.

(a) The Conflict of Interest Issue:

On October 11, 1972, Edward F. Kelly, who then represented all of the appellants, wrote to the Assistant United States Attorney prosecuting the case requesting that he be notified, "who will be testifying against whom in order that I can make immediate determination as to whether I can continue to represent that particular client." On

November 13, 1972, at a pre-trial conference on the case, the Assistant raised the conflict issue and the court directed Mr. Kelly, who was individually selected by each of the appellants, to discuss the matter with his clients individually.

On November 27, 1972, pursuant to a motion by Mr. Kelly that concluded: "If in fact such conflict exists counsel . . . wishes to withdraw as their counsel in order that no prejudice will attach by reason of his continued representation", a hearing was held to determine if any conflict of interest existed. The court at this hearing admonished the appellants, collectively and individually, to pick "some other lawyer" if they had "any feeling" that they or their counsel would be "at a disadvantage or be limited in his cross-examination or during his questioning of such co-defendants . . ." Appellant Clarke stated that he had "every confidence in him (Kelly) myself" but later sought to talk with another and different counsel. The court gave his permission for both Clarke and Brady to do so. However, Brady decided to proceed as did Baird and Shumar with Mr. Kelly, their retained counsel.[4] After a two-hour recess Clarke advised the court he would proceed with Mr. Kelly. The court also inquired if each of the appellants waived their right to get other independent counsel, and each answered freely and, apparently knowingly, that they waived such right at that time. The court advised each of the appellants that any or all of them "could bring in another lawyer . . . Any defendant, including these seven (Kelly clients) here, can bring in more lawyers."

Early in the trial, which began on January 2, 1973, appellant Shumar moved for a severance of his case. In a colloquy with the court he admitted that he had not sought other counsel and that at the time of the November

hearing "the conflict was stated to me, between Mr. Kelly's previous clients that pleaded guilty, and they would testify against me. That did not bother me." He continued: "However, I see now that it does. Under the present circumstances of this trial, Mr. Kelly cannot properly defend me." The court overruled the request. None of the other appellants joined Shumar in his motion nor made any statement to the court as to their own feeling. In the first four days of the trial Mr. Kelly made three additional oral motions for leave to withdraw and on the fifth day while appellant Clarke, who had taken the stand in his own defense, was being cross-examined, he made his fourth such motion during the trial. It was denied.

It is true that the courts "indulge every reasonable presumption against the waiver of fundamental rights" *Glasser v. United States,* 315 U. S. 60, 70 (1942), but here the appellants each specifically waived such right at the hearing on November 27th, and though the court told them again and again they could have other counsel, none chose to employ any during the intervening five to six weeks between November 27th and January 2d when the trial began. The appellants' position boils down to the proposition that since Mr. Kelly represented each of the four appellants at trial, *ipso facto* there was a conflict but the cases are all to the contrary. Representation of several defendants by the same attorney is not tantamount to the denial of effective counsel, *United States v. Williams,* 429 F.2d 158, 160 (8th Cir. 1970); *Curry v. Burke,* 404 F.2d 65, 70 (7th Cir. 1970); *Walker v. United States,* 422 F.2d 374, 375 (3d Cir. 1970). As Chief Judge Swygert said in *Curry, supra,* the "mere fact an attorney represents two defendants is not *ipso factor* evidence of inadequate representation . . . the burden is on the defendant to establish by clear and convincing evidence that a conflict of interest

existed." At 67. In fact, the failure of a defendant to retain new counsel after being informed of possible conflicts of interest with his present counsel and the probability of resulting prejudice constitutes a waiver of any subsequent claims based on the possibility of conflict. *United States v. Frame,* 454 F.2d 1136 (9th Cir. 1972). Here three of the appellants did not raise the question during the trial, and the fourth did so it appears purely as a matter of trial strategy. Appellant Clarke says that after the Government's second witness began his testimony "what trial counsel had feared and what the defendants had failed to fully understand at the conflict of interest hearing, became so apparent that a conference was held at counsel table" and appellant Shumar made a motion to sever. [Clarke Brief p. 9]. However, the record shows that the Government's second witness was James Deeghan, the agent who had installed the wiretap. After he was excused, a luncheon recess was called [Tr. 182]. Upon return from the recess and outside of the hearing of the jury the defendant Walter Smith moved the court to enter his plea of *nolo contendere* as to Count I [Tr. 181-186]. It was at this point that appellant Shumar moved for the severance. [Tr. 187]. Defendant George Tomlinson, who did not appeal, was the only defendant to join Shumar's motion. On doing so, his counsel, Palmer Ward, advised the court that Tomlinson "moved to be severed, Sir, it seems to be the thing to do. I hate to be left out." The mood of the provocateur Shumar is clear: the conflict of interest claim was one of trial tactics from its inception. The indictment was returned on April 25, 1972. Mr. Kelly represented 19 of the defendants, 15 of whom pled guilty. It was not until October 11, 1972, that any mention was ever made of a conflict of interest and it was an inquiry of the Government as to what defendants who had pled guilty would testify so "I (Kelly) can make an immediate determination

as to whether I can continue to represent that particular client". After pleading fifteen of his clients guilty, he then decided to raise the question of whether "in fact such a conflict exists". The tactic was continued at the November 27th hearing. There waivers were solemnly made in open court. Some five to six weeks expired from that date to trial and still no new counsel was engaged. The tactic failed but the appellants are bound by it. *Henry v. Mississippi*, 379 U.S. 443, 451 (1968). *United States v. Radford*, 452 F.2d 335 (7th Cir. 1971).

2. We consider the remaining points together. First, it is contended that "lay-off" bettors do not come within the term "conducting" a gambling operation. However, this contention has been decided against appellants in at least two 7th Circuit cases: *United States v. McHale*, 495 F.2d 15 (1974) and *United States v. Hunter*, 478 F.2d 1019 (1973).

Next, appellants attack the authorization of the wiretaps, asserting that they were not made by the appropriate Department of Justice officials under the Act. Our study of the record, however, shows that both the Attorney General and a specifically designated Assistant Attorney General authorized the applications made to the court for the interceptions. The recent rulings of the Supreme Court outlining the procedure necessary under the Act was, therefore, fully met and the point is not well taken. *United States v. Giordano et al*, 94 S.Ct. 1820 (1974) and *United States v. Chavez* 94 S.Ct. 1849 (1974), each of which was decided May 13, 1974. Nor is there any showing of failure to minimize the interceptions. The constitutionality of 18 U.S.C. § 1955 has been upheld in this Circuit on a like ground as here, *United States v. Hunter, supra*, at 1021; and by the Fifth Circuit in *United States v. Harris*, 460 F.2d 1041, cert. den. 409 U.S. 877.

The size and scope of the gambling business was developed fully in the testimony of Brown who was a partner of Clarke, one of the appellants here, in its operation. The evidence indicated that the operation was statewide with his headquarters at the East 46th Street location in Indianapolis and a casino at the Disabled War Veterans Club in the same city. The operation of the enterprise required more than five persons to "conduct, finance, manage, supervise, direct or own all or part of such business", and had been in operation for some two years, much longer than the "substantially continuous operation for a period in excess of thirty days" as well as involving "a gross revenue of $2,000 in any single day", as required by Section 1955.

The indictment includes separate substantive Counts II and III, covering a specific day of illegal gambling operation (March 18, 1972), on which at least $2,000 was generated and continuous operation of an illegal gambling business for over 30 days (March 20, 1972 through April 21, 1972), respectively. Appellant Clarke insists that these counts are multiplicitous in that the crime denounced by the statute is the conduct of an illegal gambling business and that the separate counts are merely jurisdictional elements of the same offense, only stating different means by which the offense might be committed. However, this defense was not raised in the trial court and "may not be raised for the first time on appeal." *United States v. Cassell*, 452 F.2d 533, 536 (7th Cir. 1971). In addition, the sentences on these counts were concurrent with that on Count I. The question raised is troublesome and without definitive precedent but in the light of our remand, we will follow the practice laid down in *Cassell, supra.*

Finally, the 91 wiretap tapes of 2 1/2 hours each covering all of the interceptions were made available to the de-

fense for the purpose of indicating which portions thereof were relevant. Forty-six of these tapes were introduced into evidence by the Government. However, the defense, after identifying the relevant portions of the tapes, insisted on playing the 46 complete recordings regardless of their relevance—which would have consumed an inordinate period of time of the court and jury (approximately 18 trial days) and introduced much irrelevant testimony. The court offered the playing of those portions of the tapes that were relevant which the appellants refused.

The appellant Shumar was permitted to change counsel after the argument in the case and his present counsel has filed a supplemental brief. Counsel raises two new points: (1) The sufficiency of the evidence against Shumar and (2) the introduction of evidence against him that was not relevant.

Shumar now contends that he was a mere "customer", not an employee of the gambling operation: "only a bettor and nothing else". He says that "the trial court judge assumed that the bets being placed by Defendant Shumar were 'lay-off' bets and that there was no substantial evidence . . . to indicate Defendant Shumar was laying off bets. Rather, the evidence leads to the conclusion that he was only placing his own personal bets." We find, however, that in his original brief filed on August 1, 1973, Shumar characterized the evidence against him: "All that was shown was the laying off of bets, a common bookie practice, and nothing was shown to indicate that commissions were received or that salaries were received." At p. 26. *McHale, supra,* a lay-off bettor case came down on April 8, 1974, holding: "Certainly the lay-off bettor is a more obvious target of § 1955 than runners, clerks and watchmen." At 18. Moreover, the record shows Shumar placed lay-off bets over the telephones of the gambling

operation, i.e. 80 calls over a single 30-day period; that he was known to the operation as Arch and had place "7" on the wooden rack at the gambling headquarters that listed key accounts. Certain services were furnished these accounts such as scratch information, race results, sports line information, green sheets and racing forms that would attract lay-off bets to the headquarters. The route man who serviced Shumar testified that the latter was his second largest customer for green sheets and racing forms. Shumar received each day 4 copies of the Daily Racing Form, six copies of the Illinois Sporting News (green sheet) and was allowed a 50 percent discount from his gambling operations. In addition, as Shumar's Supplemental Brief states, he was permitted to make his own closing argument to the jury "attempting to demonstrate the significant difference between himself and his co-defendants in their relationship to the gambling operation". At pp. 19-20. In the light of these considerations we cannot say that the evidence was not sufficient to support the jury's verdict.

Shumar's second new point has to do with the gambling paraphernalia etc. that was admitted into evidence at the trial. Shumar lists 13 items in his brief (p. 21) which he says should not have been admitted against him. But as this court held the other day in *United States v. Joyce, et al.* Nos. 73-1014, 73-1015, 73-1016, May 9, 1974, even where a conspiracy is not charged, conspiracy rules of evidence and accountability can be applied to a criminal scheme. At 7-8. Though we have ordered the conspiracy charge dismissed here, the evidence to which Shumar refers is and was admissible. Furthermore, all of the items to which he objects, same one (the poker chips) had to do with the main enterprise to which Shumar was closely

connected and of which he was part and parcel. Even if there be error, it was harmless.

The judgment is affirmed as to Counts II and III and reversed as to Count I. The case is remanded for such further proceedings as are necessary to carry out the mandate of this opinion.

It is so ordered.

FOOTNOTES

1 - § 371: If two or more persons conspire either to commit any offense against the United States . . . and any one or more of such persons do any act to effect the object of the conspiracy, and shall be fined not more than $10,000 or imprisoned not more than five years or both.

2 - § 1955: (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years or both. (b) as used in this section (1) "illegal gambling business" means a gambling business which (i) is a violation of the law of a state . . . (ii) involves five or more persons . . . and (iii) has been or remains insubstantially continuous operation . . . in excess of 30 days or has a gross revenue of $2,000 in a single day . . ."

3 - Appellant Brady, as we have noted, was acquitted on Count I; nevertheless he raises the *Hunter and Hill, supra,* point. Having been acquitted, the point becomes moot; if he claims prejudice with reference to Counts II and III, which he does not articulate, we cannot see how this would be possible since he was acquitted on the Count I charge.

4 - Appellant Brady, after advising the court: "I do want him (Kelly), sir," added: "However, I do not wish to waive my right to seek other counsel. I would respectfully ask that." Appellant Shumar also advise the court. " . . . I don't know whether that is a conflict of interest or not. But I do know that I want Mr. Kelley as my attorney." Shumar also waived his right to seek other counsel "at this time". Mr. Baird answered "I do" to the court's question: "Do you want Mr. Kelly to represent you?"

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1974

Before

Hon. TOM C. CLARK, *Associate Justice**
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. GEORGE N. BEAMER, *District Judge***

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 73-1577 vs. ARCHIE JAMES SHUMAR, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 72 CR 111)

On consideration of the petition for rehearing filed in the above entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

---

* TOM C. CLARK, Associate Justice of the Supreme Court is sitting by designation.

** GEORGE N. BEAMER, Chief Judge of the Northern District of Indiana is sitting by designation.

APPENDIX C

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business

and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except

as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5482

CLAUDE W. CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were denied effective assistance of counsel. Petitioner Shumar also contends that the evidence was insufficient to sustain his conviction and that the court erroneously permitted the introduction of certain gambling paraphernalia into evidence against him. Petitioner Clarke contends in addition that 18 U.S.C. 1955 is unconstitutional.

On April 25, 1972, petitioners were indicted with 28 other persons in a three-count indictment in the United States District Court for the Southern District of Indiana. Count 1 charged a conspiracy to violate 18 U.S.C. 1955 by conducting a gambling business involving five or more persons in violation of Indiana law; counts 2 and 3 charged substantive offenses in violation of the same statute. Five defendants, including petitioners, were ultimately tried.[1] Petitioners were convicted on all three counts.[2] Petitioner Clarke was sentenced to a term of three years' imprisonment on count 1, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2); sentences on counts 2 and 3 were suspended and Clarke was placed on probation for five years to begin at the conclusion of the sentence imposed on count 1. Petitioner Shumar was sentenced to a term of one year's imprisonment on count 1; sentences on counts 2 and 3 were suspended and Shumar was placed on probation for five years to begin at the conclusion of the sentence imposed on count 1.

The court of appeals affirmed both petitioners' convictions on counts 2 and 3 but reversed petitioners' convictions on count 1 (Shumar Pet. App. A1-A12), relying upon its decision in *United States* v. *Hunter*, 478 F. 2d 1019. The court had held in *Hunter* that Wharton's Rule precludes an indictment for conspiracy to violate 18 U.S.C. 1955.[3]

---

[1]The indictment was dismissed with respect to four of the defendants; one defendant pleaded *nolo contendere* to count 1; and 20 defendants pleaded guilty (thirteen to count 1, two to count 2, and five to count 3).

[2]Co-defendants Brady and Baird were convicted on counts 2 and 3 and co-defendant Tomlinson on counts 1, 2 and 3.

[3]The Wharton's Rule issue is pending before this Court in *Iannelli* v. *United States*, No. 73-64. The court of appeals has extended the government's time for filing a petition for rehearing in the present case until 14 days after this Court's decision in *Iannelli*.

The evidence presented at trial showed that petitioner Clarke was manager and partner with co-defendant Brown in a large, illegal bookmaking operation in Indianapolis (Tr. 140, 157). Brown and Clarke also operated a casino in Indianapolis in which poker games were conducted (Tr. 4-8, 113, 192, 471-485, 517). Petitioner Shumar, also known as "Arch" and "7", placed many lay-off bets[4] with the operation (Tr. 10-11, 16-17, 74, 328-330, 342-343, 349, 375, 478, 490, 516, 619), splitting his weekly profits or losses with Brown and Clarke on a 50-50 basis (Tr. 17-19, 21, 25, 128-129, 157, 165, 330-331, 651). The Brown-Clarke operation delivered four racing forms and six green sheets (the Illinois Sporting News) to petitioner Shumar daily, and picked up or delivered gambling payments (Tr. 43-44, 471-474, 484-485, 497, 502-503, 506-509). Bets were placed by telephone (Tr. 71-95, 332 *et seq.*).

At 3:00 p.m. on April 21, 1972, F.B.I. agents, acting pursuant to search and arrest warrants, searched the apartment in which the bookmaking operation was conducted (Tr. 191-192, 252, 276). Clarke and co-defendant Sights, who were in the apartment at the time of the raid, were arrested (Tr. 192-193, 213, 258, 276-277, 287, 289). Gambling paraphernalia was seized by the agents (Tr. 195-213, 259-266, 278-288). While they were in the apartment, the agents answered the telephones; callers asked for Claude or Joe and attempted to place bets or obtain horse betting information (Tr. 270).

Meanwhile, agents searched petitioner Shumar's apartment (Tr. 234-235) and placed Shumar under arrest (Tr. 234-236, 246, 249). The agents answered Shumar's telephones for about an hour or an hour and a half (Tr. 241-

---

[4]A lay-off bet is placed by one bookmaker with another to prevent large gambling losses.

242); all the telephone calls he received concerned horse-racing bets, and many of the callers asked for "Arch" (Tr. 242-246). Moreover, a court-ordered wiretap placed on the Brown-Clarke telephones between March 17, 1972, and April 14, 1972, revealed 86 calls to Shumar's telephones (Tr. 309; see also Tr. 417-426, 648-650). Evidence obtained through the court-ordered wiretaps showed that the telephones at both locations had been used by petitioners, among others, to book horse-racing and sports bets (Tr. 215-221, 295-311, 349-362, 373-392, 397-402, 416-426, 458-469).

A simultaneous search of the casino run by Brown and Clarke resulted in the seizure of gambling paraphernalia including racing forms, green sheets, and poker chips, as well as cash (Tr. 534-544).

Petitioner Clarke testified at trial on his own behalf (Tr. 598 *et seq.*). He admitted conducting the gambling operation with Brown (Tr. 615-621). His defense was that he thought that if he bought a yearly Federal Wagering Tax Stamp, confined his activities to the State of Indiana, and prevented state and local authorities from discovering his gambling activities, he would not be in violation of any federal laws (Tr. 621-622). Petitioner Shumar did not testify and presented no evidence.

1. Both petitioners contend that they were denied effective assistance of counsel because they were represented by counsel who also represented other co-defendants. This contention was correctly rejected by the court of appeals, on whose opinion we rely (Shumar Pet. App. A3-A7). Petitioners had ample prior notice that a conflict might arise at the trial, and they waived their right to seek other counsel in open court (Tr. 935-962). As the court of appeals stated (Shumar Pet. App. A6), "the

failure of a defendant to retain new counsel after being informed of possible conflicts of interest with his present counsel and the probability of resulting prejudice constitutes a waiver of any subsequent claims based on the possibility of conflict." In any event, the fact that a single counsel represents several defendants is not tantamount to the denial of effective assistance of counsel. See *United States* v. *Lovano*, 420 F. 2d 769, 772-774 (C.A. 2), certiorari denied, 397 U.S. 1071; *United States* v. *Frame*, 454 F. 2d 1136, 1138 (C.A. 9).

Moreover, "the burden of proof is on a defendant to establish by clear and convincing evidence that a conflict of interest existed." *Curry* v. *Burke*, 404 F. 2d 65, 67 (C.A. 7). Petitioners have failed to establish such a conflict of interest. Petitioner Clarke's broad contention that the "complexity" of the statute and the "varying complicity of the defendants" created an "inevitable" conflict of interest (Pet. 4) would apply to virtually any prosecution brought under 18 U.S.C. 1955, which applies to gambling businesses involving several persons. Petitioner Shumar's contention (Pet. 13) that his counsel was unable to distinguish his role as "customer" from that of his co-defendants as "employees" is without basis; there is no reason to suppose this distinction was lost upon counsel. The added fact that petitioners failed to retain new counsel after being informed of the possibility of a conflict of interest in their single retained counsel further discredits their contention that such a conflict existed and gives credence to the court's surmise that the conflict of interest claim amounted to nothing more than a "trial tactic" (Shumar Pet. App. A7).

2. Petitioner Shumar contends that the evidence was insufficient to sustain his conviction for violations of 18 U.S.C. 1955. As the court of appeals stated, however (Shumar Pet. App. A9-A10):

> [T]he record shows Shumar placed lay-off bets over the telephones of the gambling operation * * *; that he was known to the operation as Arch and had place "7" on the wooden rack at the gambling headquarters that listed key accounts. Certain services were furnished these accounts such as scratch information, race results, sports line information, green sheets and racing forms that would attract lay-off bets to the headquarters. The route man who serviced Shumar testified that the latter was his second largest customer for green sheets and racing forms. Shumar received each day 4 copies of the Daily Racing Form, six copies of the Illinois Sporting News (green sheet) and was allowed a 50 percent discount from his gambling operations.

Considered in the light most favorable to the government, this evidence was sufficient to sustain the conviction. See *United States* v. *Bobo*, 477 F. 2d 974 (C.A. 4).

3. Petitioner Shumar contends that the court erroneously admitted certain gambling paraphernalia into evidence against him, since there was no allegation that he participated in their use. As the court of appeals correctly stated, however, "even where a conspiracy is not charged, conspiracy rules of evidence and accountability can be applied to a criminal scheme" (Shumar Pet. App. A10). See *United States* v. *Joyce*, 499 F. 2d 9, 16 (C.A. 7), certiorari denied, November 25, 1974 (No. 73-1947). Moreover, all the items to which Shumar objects save one—the poker chips seized from the veterans club—were

related to the gambling operation in which petitioner was intimately involved. Thus, as the court of appeals held (Shumar Pet. App. A10-A11), any error in the admission of the poker chips was harmless.

4. Petitioner Clarke's contention that 18 U.S.C. 1955 is unconstitutional has been consistently rejected by the courts of appeals. See, *e.g.*, *United States* v. *Sacco*, 491 F. 2d 995, 1001-1003 (C.A. 9); *United States* v. *Dimario*, 473 F. 2d 1046, 1047 (C.A. 6), certiorari denied, 412 U.S. 907; *Schneider* v. *United States*, 459 F. 2d 540, 542-543 (C.A. 8), certiorari denied, 409 U.S. 877. As the Eighth Circuit stated in *Schneider*, *supra*, the statute is a "constitutional exercise of power under the commerce clause" (459 F. 2d at 542), notwithstanding that offenses under the statute are based on state law and that the nationwide effect is not uniform.

In enacting 18 U.S.C. 1955, Congress reasonably found that illegal gambling affects interstate commerce (see 84 Stat. 936). Gambling, like loan sharking, " * * * is one way organized interstate crime * * * syphons funds from numerous localities to finance its national operations." *Perez* v. *United States*, 402 U.S. 146, 157. The means chosen to control this evil are reasonable. *White* v. *United States*, 399 F. 2d 813 (C.A. 8).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

SUPREME COURT, U.S.

JAN 23 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER SHUMAR

JOHN P. PRICE
RICHARD J. DARKO
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204

Central Publishing Company, Inc., Indianapolis, Ind. 46206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER SHUMAR

Arguments made in the Memorandum For The United States In Opposition to the Petition for Certiorari, in relation to the question whether the evidence presented was sufficient to support Petitioner Shumar's conviction, compel Petitioner to file this reply, pursuant to Rule 24(4), Revised Rules of the Supreme Court.

The government's statement of the facts and citations to particular pages of the transcript reveals no attempt

whatsoever to distinguish between Petitioner's placing of personal bets with the gambling operation charged in the case and the placing of "lay-off" bets. (Memorandum In Opposition, page 3)

Indeed, even the government's definition of a lay-off bet is inaccurate and misleading. (Memorandum In Opposition, footnote 4) As defined by the court in *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973) a lay-off bet occurs when a bookmaker has accepted a bet from a third party in an amount which he feels he cannot personally cover, and then transfers all or part of that bet to a second bookmaker or bookmaking operation, such as the gambling operation charged in this case. A similar definition of a lay-off bet, as necessarily involving a third party who originates the bet, was given in testimony in this case. (Tr. page 21) The government's definition does not include the necessity for a third party originator to be involved.

Petitioner contends that although he may have been placing his own personal bets with the gambling operation, he was not placing lay-off bets originated by third parties, and contends that the evidence is not sufficient to demonstrate his placement of lay-off bets.

The distinction between a personal bet and a lay-off bet is crucial to a determination whether the evidence was sufficient to convict Petitioner, in view of the technical requirements of 18 U.S.C. § 1955. The placing of lay-off bets has been held to fall within the statutory prohibition of 18 U.S.C. § 1955. *United States v. McHale*, 495 F.2d 15 (7th Cir. 1974); *United States v. Hunter*, 478 F.2d 1019 (7th Cir. 1973). However, the Courts of Appeal have rather consistently held that the language of the Act was not intended to include the player in an illegal game of chance, the person who participates in an illegal gambling

activity by placing a bet, or a customer or mere bettor with the gambling operation. *United States v. Harris,* 460 F.2d 1041 (5th Cir. 1972); *United States v. Becker,* 461 F.2d 230 (2nd Cir. 1972); *United States v. Bobo,* supra; *United States v. Hunter,* supra; *United States v. McHale,* supra; *United States v. Riehl,* 460 F.2d 454 (3rd Cir. 1972).

The legislative history of the Act, as supporting the interpretation that a mere customer or bettor is not included within the prohibitory language, was discussed in great detail by the 5th Circuit in *United States v. Harris,* supra.

At the eighth and ninth lines of page three of the Memorandum In Opposition the government refers the Court to a series of transcript pages to support the government's statement that petitioner "placed many lay-off bets with the operation." A review of those transcript pages reveals no evidence whatsoever that the bets being placed by petitioner were lay-off bets, contrary to the government's statement. Rather, a review of those transcript pages demonstrates that although petitioner had a significant volume of business with the gambling operation, the business consisted of his own personal bets, and that the owners and operators of the gambling operation had no knowledge as to petitioner placing lay-off bets.

At page six of the Memorandum In Opposition the government quotes a portion of the Court of Appeals' opinion concluding that petitioner placed lay-off bets. In arriving at this erroneous conclusion, the Court of Appeals relied substantially upon its notation that:

> "We find, however, that in his original brief filed on August 1, 1973, Shumar characterized the evidence against him: 'All that was shown was the laying off of bets . . .' ". (Shumar Pet. App. A-9)

Petitioner considers this reference to an unauthorized statement made by predecessor counsel in his original brief in the Court of Appeals to be misplaced, and indeed prejudicial to petitioner, and urges this Court to disregard that statement and the Court of Appeals reliance thereon.

As noted by the Court of Appeals, petitioner was permitted to change counsel in the Court of Appeals after the argument in the case and successor counsel was permitted to file a supplemental brief. (Shumar Pet. App. A-9) A review of the records of the Court of Appeals, and of the original brief filed in the Court of Appeals on behalf of petitioner, reveals that predecessor counsel did not even have the benefit of a transcript of the evidence at the time the original brief was prepared and filed. Both the form and the substance of the original brief leave a great deal to be desired. Furthermore, predecessor counsel failed to appear for argument of this appeal on behalf of petitioner at the time set by the Court of Appeals, after notice.

Out of a belief that he was not receiving effective representation on appeal, petitioner retained present successor counsel. The uninformed and unauthorized factual conclusions of predecessor counsel should not have been considered by the Court of Appeals in its determination, and should not be considered by this Court.

As discussed in the Petition each of the factual circumstances relied upon by the Court of Appeals, and in the Memorandum For The United States In Opposition, is equally consistent with the fact that petitioner was placing his own personal bets with the gambling operation as with the proposition that he was placing lay-off bets.

In conclusion, petitioner respectfully submits that certiorari should be granted as to each of the three questions presented in the Petition For Certiorari.

Respectfully submitted,

/s/ JOHN P. PRICE

John P. Price

/s/ RICHARD J. DARKO

Richard J. Darko

BINGHAM SUMMERS WELSH & SPILMAN
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204
(317) 635-8900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief Of Petitioner Shumar has been served upon the following counsel, pursuant to Rule 33(1)(3)(b), Revised Rules, Supreme Court of the United States, by depositing three copies of the same for each counsel in the United States mail with first class airmail postage prepaid.

Solicitor General
Department of Justice
Washington; D.C. 20530

Stanley B. Miller
District Attorney
United States Court House
Room 246
Indianapolis, Indiana 46204

Edward F. Kelly
Riley Towers
225 East North Street
Indianapolis, Indiana 46204

K. Edwin Applegate
321 E. Kirkwood
Bloomington, Indiana 47401

James Manahan
129 E. Market St.
Indianapolis, Indiana 46204

Dated this 21st day of January, 1975.

/s/ RICHARD J. DARKO

Richard J. Darko
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204